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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 953

IN THE MATTER

of

LONG ISLAND UNIVERSITY,

Debtor,

JOHN P. McGRATH and JOSEPH O'CONNOR, Trustees in Reorganization of Long Island University, and Long Island University, Debtor,

Petitioners,

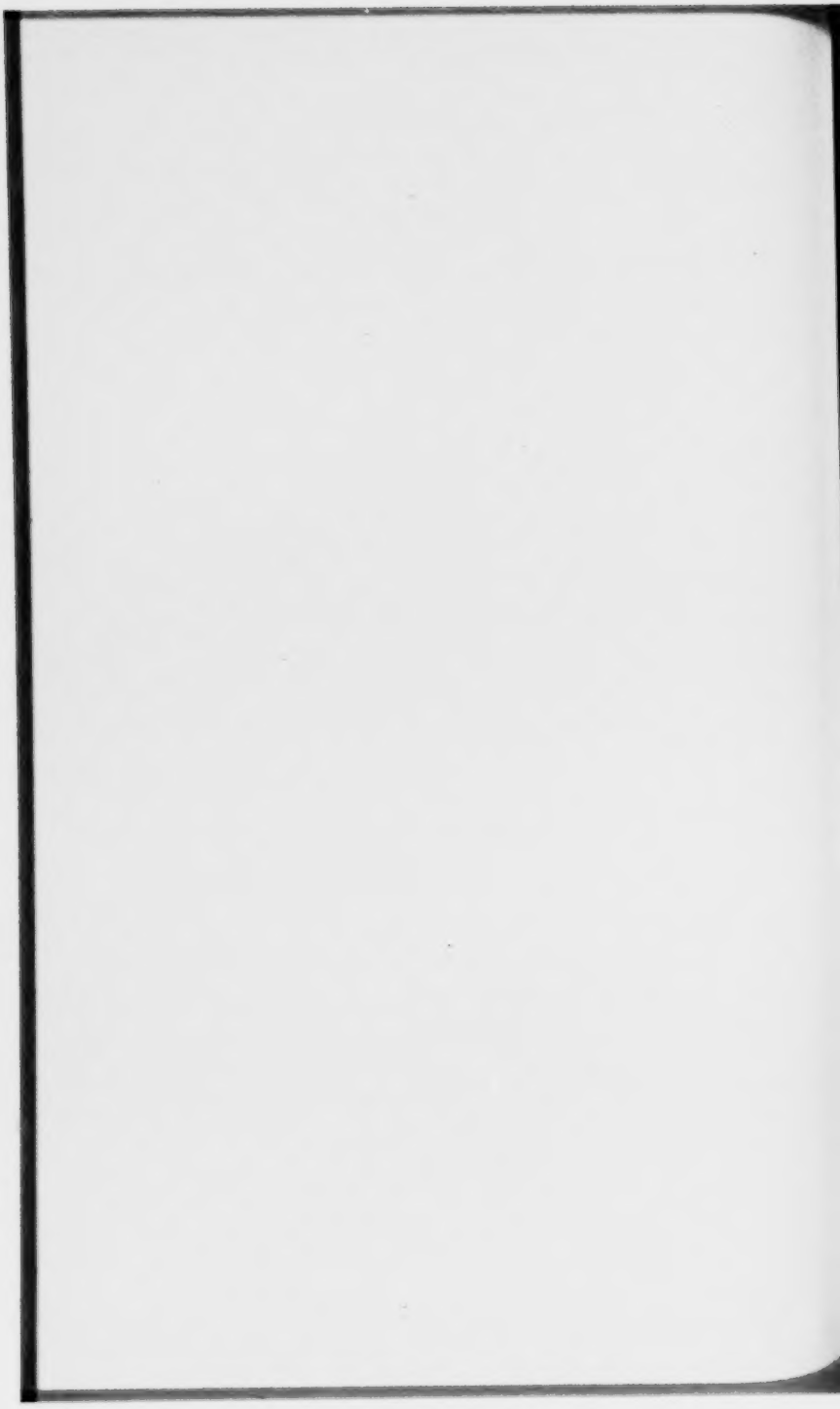
versus

FRANK FOX,

Creditor-Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CADWALADER, WICKERSHAM & TAFT,
WALTER BRUCHHAUSEN,
Attorneys for Respondent.



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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 2 Cir., 152 Fed. (2d) 616. The opinion of the District Court is not reported excepting in the record at page 3a.

The Petitioners Have No Valid Ground for Their Application for a Writ of Certiorari.

The case merely involves a question of procedure under New York Law. The respondent contends that there is abundant final authority on the point. The petitioners themselves do not claim that the ruling of the Court below is definitely in conflict with local decisions. They qualify their assertion with the statement that it is "probably in conflict" with such decisions (p. 8 of Petitioners Application).

Statement of the Case.

The respondent respectfully prays that this Court deny the petition for a writ of certiorari to review the order of the United States Circuit Court of Appeals for the Second Circuit, which unanimously reversed an order of the United States District Court for the Eastern District of New York. The said order of which a review is now sought determined that a judgment recovered by the respondent Fox against the debtor on January 14, 1943 was a valid first lien against the proceeds of the sale of the Debtor's real property. The Chapter X petition herein was filed on September 3, 1943.

The petitioners' contention is that the judgment is jurisdictionally defective and that the lien thereunder is void because of the failure to obtain an order substituting Frank Fox as the party plaintiff in the action, hereinafter mentioned, in the place of The Brooklyn National Bank.

On the other hand, the respondent contended that the judgment and lien are valid and may not be attacked collaterally in this proceeding; also that the failure to procure such an order was merely an irregularity.

Many of the matters recited on pages 6 and 7 of the petitioners' application are not facts. They are erroneous conclusions of the petitioners. We are therefore obliged to state the facts in brief.

In 1936 the debtor, Long Island University, became indebted to Brooklyn National Bank. In April, 1942 the said Bank brought suit on said claim in the Supreme Court, Kings County. The debtor was personally served with the summons and complaint and appeared by attorney. In July, 1942 the debtor and its attorneys signed a stipulation admitting that it had no defense to the action and that plaintiff was entitled to judgment, without further notice (R. 23a). In December, 1942 the said Bank assigned the cause of action to the respondent, Frank Fox. The assignment was in writing. The petitioners do not deny that the moneys were owed. No question is raised as to the validity of the assignment. In fact, the petitioners-trustees allege in their answer that the assignment was made (R. 15a).

The assignee's attorney prepared a judgment roll, including the assignment, the affidavit of regularity, made by the Bank's attorney, the judgment, prepared by and in the name of Lynn G. Goodnough, as attorney for Frank Fox, as plaintiff, and other necessary papers. The affidavit of regularity, in part provided:

> "that the Brooklyn National Bank of New York has assigned and transferred to Frank Fox, the plaintiff, all its right, title and interest in the within claim and cause of action and in and to all moneys now due and to become due to said The Brooklyn National Bank of New York on account of and by reason of the said claim and cause of action, which assignment is filed as part of this judgment roll" (R. 24a).

Contrary to petitioners' assertion, the answer of the trustees alleged "that the judgment was entered * * * in

an action captioned 'Frank Fox, Plaintiff *v.* Long Island University, Defendant' * * *".

Within a month after entry of the judgment the debtor was informed that Fox had recovered judgment (R. 16a). Two months later, in April, 1943, the debtor notified all of its creditors that Fox was the assignee and had entered judgment in his favor. (Trustee's Exhibit 13, T. R. 100.) Contrary to petitioners' statement, the respondent instituted supplementary proceedings and moved for a receiver. (Admitted allegations of the pleadings herein.)

In its petition for reorganization herein, dated September 2, 1943, the debtor alleged that it owed the said claim, that it was assigned to Fox and that judgment was obtained by him (R. 28a).

The petitioners fail to inform the Court that the guaranty by Mr. Thralls to Mr. Fox was given subsequent to the assignment made to him (R. 18a).

The Issue on this Application.

That the failure of the respondent Fox to obtain an order of substitution was a mere irregularity and the validity of his judgment was not affected by such omission.

POINT I.

Failure of the respondent to obtain an order, substituting himself as a party plaintiff in the action, was a mere irregularity and did not prejudice a substantial right of the debtor and must therefore be disregarded.

The respondent admittedly did not obtain an order substituting himself as party plaintiff as was his right under Sections 83 and 485 of the New York Civil Practice Act.

The petitioners' entire case rests upon that omission. The petitioners do not establish that such omission prejudiced any substantial right. As we have demonstrated, there is no basis for such a claim. They admitted the indebtedness to the Bank. They conceded that the Bank duly assigned its claim to the respondent Fox.

The distinction between a jurisdictional defect and an irregularity is simply this: if the debtor's substantial rights were thereby prejudiced, the defect would be jurisdictional, otherwise not. The New York Statute expressly states that irregularities of procedure must be disregarded.

The statute was before this Court on *Irving Trust Co.* v. *American Silk Mills,* 2 Cir., 72 Fed. 2d 288, certiorari denied 293 U. S. 624. It appeared therein that Irving Trust Company, as receiver of Garment Center Capitol Inc. sued for rent under a lease made by that corporation, as landlord, to the defendant and recovered a money judgment. On appeal to the Circuit Court of Appeals, the defendant contended that the judgment was invalid in that the receivers were not the proper parties plaintiff. The said court on appeal amended the judgment *nunc pro tunc* by substituting Garment Center Capitol Inc., a stranger to the action, as party plaintiff. In holding that the omission to obtain the order of substitution, prior to judgment, was merely an irregularity, the court quoted the curative statute, Section 105 of the New York Civil Practice Act, to wit:

> "At any stage of any action, special proceeding or appeal, a mistake, omission, irregularity or defect may be corrected or supplied, as the case may be, in the discretion of the Court, with or without terms, or, if a substantial right of any party shall not be thereby prejudiced, such mistake, omission, irregularity or defect must be disregarded."

Section 109 subdiv. 12 of the said Practice Act, a companion to the said Section 105, reads, in part:

> "In a court of record * * * the judgment shall not * * * be impaired or affected * * * for any other default or negligence of the clerk or any other officer of the Court or of a party, his attorney or counsel, by which the adverse party has not been prejudiced. Each of the omissions * * * and any other of like nature, not being against the right and justice of the matter, and not altering the issue between the parties, or the trial, must be supplied when necessary, and the proceeding amended, by the Court wherein the judgment is rendered or by an Appellate Court."

The Court below, in its opinion, said:

> "And failure to comply literally with its terms (the terms of Section 83 of the said Practice Act, as to obtaining an order of substitution) appears to be an oversight on the part of the parties or court officials of the kind which is amendable under N. Y. Civil Practice Act 109(12), or at most an omission or irregularity which a New York court must ignore or correct under 105. In fact 2 R. S. 1829, pt. 3, tit. 5, p. 425, Sec. 7, which was the predecessor of 109, was so construed in Christal *v.* Kelly, 88 N. Y. 285, 286, where the plaintiff had failed to comply with the statute requiring a court order for amendment to add a party. And in Wight *v.* Alden, 3 How. Pr., N. Y. 213, before even the passage of the remedial Sections, the court denied a motion to set aside a judgment upon confession on the grounds that the plaintiff failed to obtain the required court order. Here, as in both of the cases cited, there is apparent no injury to respondents through the omission to procure a court order. The debtor itself stipulated that it had no defense to the action brought by the Brooklyn National Bank, and it has not seriously questioned the validity of the assignment to Fox."

In *Miskind-Feinberg Realty Company* v. *Sidorsky,* 189 N. Y. 402, cited by the court below, the court (p. 407) said:

> "The Supreme Court has very broad powers, * * * after judgment * * * to amend any process, pleading or proceeding. (Sec. 723, now Section 105 of the Practice Act.) It would be difficult to use more comprehensive language than is used in that section. * * * The statutory provisions relating to the commencement of an action are intended for the protection of the rights of the persons who are named as defendants therein. Whatever the statute requires that in any way tends to aid a defendant in the protection of his rights is necessary to be complied with to give the court jurisdiction. Where it is clear that a deviation from the Statute is unimportant and unsubstantial and the defendant has not been prejudiced thereby it is within the power of the court to amend the process or proceeding. The order * * * was not void but irregular * * *"

The court below further said:

> "A striking case of this kind is People *ex rel.* Durham Realty Co. *v.* Cantor, 234 N. Y. 507, 138 N. E. 425, reversing 201 App. Div. 834, 192 N. Y. S. 657, reversing on the dissenting opinion of Clark, J., below and allowing late substitution of an individual for a corporate name in certiorari proceedings for reduction of tax assessments."

In *Christal* v. *Kelly,* 88 N. Y. 285, 290, it was held that the debtor's obligation was the cause of action. A change in the name of the party would not, therefore, constitute a new cause of action.

The court below said:

> "They (the petitioners) rely upon Smith *v.* Zalinski, 94 N. Y. 519, 522, where, however, the court

> significantly added: 'Such a transfer of interest is usually a formal matter in which the defendant has no concern except to be protected from a double claim.' Here the court had general jurisdiction, and the defendant has appeared. The New York courts have consistently said that, even where notice of motion is required for further proceedings in an action, failure to give it is not a jurisdictional defect. * * * The several cases cited by respondents seem to us clearly instances where there is a fundamental lack of authority affecting a substantial right, such as where a clerk of the court goes beyond his authority and either enters a judgment in contract and tort where the statute permits entry in contract only (Bouker Contracting Co. *v.* Neale, 161 App. Div. 617) or enters judgment where his only function is to hear and report (Cartier *v.* Spooner, 118 App. Div. 342). The judgment entered against the debtor here was entered on a genuine debt in favor of the real party in interest; and it is *res adjudicata* as regards the Brooklyn National Bank and Fox, as well as the debtor and its creditors. Candee *v.* Lord, 2 N. Y. 269. That is all that respondents can rightfully demand."

In *Shorer* v. *T. P. & P. Co.*, 119 N. Y. 483, cited by the Petitioners, the defendant was prejudiced and deprived of a substantial right. Although he had appeared in the action, judgment was entered without notice to him. He was in the same relative position as though he had not received process.

In *Greenfield* v. *Greenfield*, 215 App. Div. 504, cited by the petitioners, no clerical error was claimed. The ruling was that the Court had no jurisdiction to grant a judgment of separation by consent and without proof.

In *Christal* v. *Fifty Five Columbus Corp.*, 168 Misc. 119, cited by the petitioners, an affidavit for summary judgment was not made by the person having knowledge of the facts and a cause of action had not been established.

In *Fidelity & Casualty Co.* v. *Merendino,* 220 App. Div. 24, cited by the petitioners, the record on appeal discloses that the defendant was not indebted to the plaintiff.

Herpe v. *Herpe,* 225 N. Y. 323, cited by the petitioners, was an equity action between rival claimants to a bank account. The bank was a defendant. The Trial Court, exercising its discretion in equity, denied costs to plaintiff; on motion, Special Term amended and granted costs. The Court of Appeals held that Special Term did not possess such power, meaning that it had no jurisdiction to review a Trial Term order.

In brief, the petitioners' attack upon respondent's judgment is technical and without substance. If the respondent had applied for a substitution, it would have been granted *pro forma.* The petitioners on their own showing could not thwart it. They owed the money and admitted that the assignment was valid.

POINT II.

The New York Supreme Court acquired jurisdiction of the Respondent.

The respondent Fox voluntarily submitted to the jurisdiction of that Court.

It has been held that one may consent to jurisdiction.

De Dood v. *Pullman Co.,* 57 Fed. 2d 171;
Gilbert v. *Burnstine,* 255 N. Y. 348;
Thurber-Whyland Co. v. *Klittner,* 16 N. Y. Supp. 828;
Matter of Heldmann, 153 App. Div. 583;
Matter of Holmes, 291 N. Y. 261, 283.

POINT III.

The judgment is not subject to collateral attack.

The court below correctly stated the rule, viz.:

> "Since this is a collateral attack on the New York judgment, we cannot hold the lien invalid unless the defect is one which, under the New York law, went to the jurisdiction of the Court. *White* v. *Crow*, 110 U. S. 183; *McGoon* v. *Scales*, 76 U. S. 23," and other cases.

Conclusion.

The petition for a writ of certiorari should be denied.

Dated, New York, April 1, 1946.

Respectfully submitted,

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